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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. ~~1496~~ 134.

REPUBLIC NATURAL GAS COMPANY, a corporation,
Appellant,

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and PEERLESS OIL & GAS COMPANY, a corporation, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 1496

REPUBLIC NATURAL GAS COMPANY, a corporation,
Appellant,

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and PEERLESS OIL & GAS COMPANY, a corporation, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

Pursuant to Rules 7(3) and 12(3) of the Rules of this Court, Appellant files this, its brief in opposition to Appellees' Motion to Dismiss.

I.

The Judgment Appealed From Is "Final".

Appellees concede the judgment below is final by Oklahoma law, but contend it lacks the finality requisite for appealability under Section 237(a) of the Judicial Code (28 U. S. C. A. §344a, 8 F. C. A., Title 28, §344a).

The controversial issue in the instant proceeding was whether Republic could be compelled, against its will, to purchase and transport gas from the Peerless well. Paragraph I of the Commission's order, affirmed by the Oklahoma Supreme Court, determinatively adjudicates this issue:

> "IT IS THEREFORE ORDERED . . . 1. That the respondent, Republic Natural Gas Company, be, and it is hereby, required to take gas ratably from applicant's well . . . and to make necessary connection . . . and in event of failure of respondent to do so, respondent shall no longer be permitted to produce any of its wells located in the Hugoton Oklahoma Gas Field."

Undeniably that is a final judgment. It terminates the litigation on the merits, and leaves nothing further to be determined or done. That it is not enforceable by ordinary execution is immaterial,[1] nor is its finality jeopardized by the inclusion of a specified penalty for noncompliance.[2]

Appellees assert (Motion to Dismiss, p. 4), however, that finality is postponed by the reservation, in paragraph 2 of the judgment, of jurisdiction subsequently to determine "the terms and conditions of taking" *in event* the adversaries are unable to agree. That portion of the judgment upon which Apellees rely provides:

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1. *Old Colony Trust Co. v. Comm'r.*, 279 U. S. 716, 725, 73 L. ed. 918 (1929); *cf. Fidelity Nat. Bank & T. Co. v. Swope*, 274 U. S. 123, 132, 71 L. ed. 959 (1927).

2. *Wabash & Erie Canal Co. v. Beers*, 1 Black (U. S.) 54, 17 L. ed. 40 (1862); Ex parte *M. & M. R. R. Co.*, 2 Wall. (U. S.) 440, 17 L. ed. 860 (1865).

"IT IS THEREFORE ORDERED . . . 2. The terms and conditions of such taking of natural gas by Republic Natural Gas Company from said Peerless Oil and Gas Company's well *shall* be determined and agreed upon by and between applicant and respondent; and *in the event* said parties are *unable* to agree, applicant and respondent are hereby granted the right to make *further application* to the Commission for an order fixing such terms and conditions; and the Commission retains jurisdiction for such purpose." (Italics ours)

It will be observed the command that the parties themselves agree upon the terms of ratable taking is a definitive order, mandatory and unqualified. The litigants are given no "option". Paragraph 1 of the judgment orders Republic "to take gas ratably" from the Peerless well, and paragraph 2 *requires* the litigants to agree among themselves upon the terms of taking.

What, then, is left "to the judicial discretion of the trial court"?[3] The judgment concludes the litigation — "there is nothing more to be decided".[4] No further proceedings of any type, characterized by "judicial discretion" or otherwise, are contemplated. Hence, the judgment satisfies fully the test announced by this Court in *Georgia Railway & Power Co. v. Decatur*, 262 U. S. 432, 436, 67 L. ed. 1065 (1923), cited by Appellees at page 4 of their Motion to Dismiss:

". . . the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to

3. *Georgia Railway & Power Co. v. Decatur*, 262 U. S. 432, 436, 67 L. ed. 1065 (1923).

4. *Richfield Oil Corp. v. State Board of Eq.*, 329 U. S. 69, 91 L. ed. (Adv. Sheet) 123, 125-126 (25 Nov., 1946).

> execute the judgment or decree it had already rendered."

Appellees cite *Hunter v. McHugh*, 320 U. S. 222, 88 L. ed. 5 (1943)[5] for the proposition that, "Until an order shall have been entered . . . fixing the terms and conditions of the taking of natural gas . . ." (Motion to Dismiss, p. 4), review by this Court is premature.

This argument misconceives the nature of the judgment appealed from. As already pointed out, the final judgment below is not conditioned upon precedential determination by the Commission of the terms of ratable taking. The judgment is effective *immediately* without further act or order of the Commission or Oklahoma Supreme Court. If finality must await the Commission's pronouncement of the terms of taking, it is highly unlikely the instant litigation will ever become concluded inasmuch as the Commission will never consider this problem unless the parties fail to comply with the order that they themselves decide upon the terms of taking. Certainly the Commission does not contemplate being called upon to arbitrate this issue:

> "The last and final question . . . how to effect ratable taking between these parties . . . is a matter that this Commission should never be called upon to solve."[6]

Are Appellant's constitutional rights to be withheld in abeyance until the Commission passes upon a col-

5. But in the Hunter appeal, dismissed for want of a substantial federal question, the Commission's order had, after perfection of appeal to this Court from its affirmance by the Louisiana Supreme Court, been rescinded, leaving no specific application of the controversial statute for review, and arguably rendering moot the entire appeal.

6. Fifth paragraph, page 6, of the Commission's mimeographed order.

lateral issue it never expects to consider and has ordered the litigants themselves to solve?

Upon Appellees' thesis, Appellant is required, in order to perfect and protect its right of appeal, to defy an affirmative order of the Commission and refuse to agree upon any terms of taking —for to agree upon terms would clearly estop Appellant from proceeding further to assail the judgment in which it thus acquiesed. And, in this connection, we call attention to the fact that the Commission's reluctant consent to consider the "terms of taking" issue is operative only if the parties are *unable* to agree. If Appellant simply *refused* to agree — as, upon Appellees' postulate, it must in order to effectuate its prerogative of seeking this Court's protection of its constitutional rights — the judgment would appear to require the shutting in of Appellant's wells, rather than to solicit further administrative consideration of the terms of taking.

The judgment appealed from orders Republic to take gas ratably from the Peerless well. It orders Republic and Peerless to agree upon the terms of such taking. It is a complete, final judgment, neither requiring nor contemplating further Commission action in order to render it immediately effective. If that judgment be affirmed by this Court, nothing will remain to be done by either the Commission or the Oklahoma Supreme Court. The judgment is self executing. Especially since the reservation by the Commission of jurisdiction to entertain a "further application", in event its final order proves unworkable, adds nothing to the power possessed by it even in the absence of such recital in the order, we submit the judgment, as affirmed, is a "final" one. That *new* proceedings may subsequently be instituted by either party cannot deny finality to the decree culminating the *present*

litigation. A latent power to revise, there being no application pending which invites reconsideration by the Commission, is no deterrent to finality:

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurdiction. Our test is a practical one."[7]

As a matter of fact, it is not essential that an order, to be "final", constitute "the ultimate judgment or decree completely closing up a proceeding".[8] Nor is it invariably fatal to finality that something remains to be done in order to conclude the litigation.[9] The authorities display no rigid adherence to so mechanical a test:

> "But even so circumscribed a legal concept as appealable finality has a penumbral area . . . Considerations of English usage as well as those of judicial policy would readily justify an interpretation of 'final judgment' so as to preclude reviewability here where anything further remains to be determined by a State court, no matter how dissociated from the only Federal issue that has finally been adjudicated by the highest court of the State . . .

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7. *Market Street R. Co. v. Railroad Comm. of Cal.*, 324 U. S. 548, 551-552, 89 L. ed. 1171 (1945).

8. *United States v. 243.22 Acres of Land*, 129 F. (2d) 678, 680 (C. C. A. 2, 1942); *Kasishke v. Baker*, 144 F. (2d) 384, 386 (C. C. A. 10, 1944).

9. *Bronson v. La Crosse & M. P. R. Co. et al.*, 2 Black (U. S.) 524, 17 L. ed. 359 (1863); *Gulf Refining Co. v. United States*, 269 U. S. 125, 70 L. ed. 195 (1925).

> "Unfortunately, however, the course of our jurisdictional history has not run as smoothly as such a mechanical rule would make it."[10]

Certainly it is not material that further orders remain necessary in order to enforce or carry into effect the state court judgment.[11]

Yet here, in the case at bar, the judgment under review *is* the ultimate judgment of the court below. It *does* completely terminate the proceeding. *Nothing* remains to be done in order to conclude the litigation, or to make effective the judgment of the Oklahoma Supreme Court. There is, here, merely a latent power in the Commission to consider a "further application" in event, but only in event, the final judgment already rendered is not complied with by the litigants.

Whether the reserved power be considered equivalent to latent jurisdiction to entertain a *new* proceeding, or, instead, to issue further orders to enforce or achieve effective operation of the existing order in the *instant* proceeding, its exercise is not a condition precedent to immediate execution of the present judgment, and, therefore, does not defer finality.

In calculating the effect of the Commission's declared reservation of jurisdiction to entertain additional applications, it is pertinent to observe that the judgment below first resolves the federal issue by determining Appellant is subject to the Commission's authority under the controversial statutes, and, then, *simply orders Appellant to comply with the legislative enactment.* That portion of

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10. *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 124-125, 89 L. ed. 2092 (1945).

11. *Knox Nat. Farm Loan Asso. v. Phillips*, 300 U. S. 194, 81 L. ed. 599 (1937); *In re Casaudoumecq*, 46 F. Supp. 718 (S. D. Calif., 1942).

the judgment upon which Appellees rely as proscribing finality is, in fact, a final order, couched in the *verbatim* terminology of the statute, commanding Appellant to conform to the statutory mandate:[12]

> "Any person, firm or corporation . . . shall take ratably from each owner of the gas in proportion to his interest in said gas, *upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing;* provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas." (Italics ours)

How, we respectfully submit, can a definite order directing Appellant forthwith to take gas ratably in accordance with the terms of the statute, be construed as anything other than a complete, final judgment?

It might also be noted that ascertainment of the "terms and conditions of such taking" presents no problem.

The statutes themselves, and even the instant Oklahoma Supreme Court judgment and Commission order, prescribe the formula for "ratable taking". Application thereof to the present litigants, in view of "open flow" and "deliverability" tests already taken and well "allowables" heretofore announced by the Commission (see paragraph 1, page 3, typewritten opinion herein of the Oklahoma Supreme Court), would be a mere ministerial undertaking:

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12. Laws 1913, Ch. 198, p. 440, §3 (52 Okl. St. Ann. §233, p. 500) —quoted at page 4 of the mimeographed Commission order.

". . . the amount of gas each owner may take therefrom [from the 'common reservoir of gas'] shall be proportionate to the natural flow of his well or wells to the natural flow of the well or wells of such other owners of the same common source of supply of gas, such natural flow to be determined by any standard measurement at the beginning of each calendar month."[13]

". . . any person . . . may take therefrom [from any 'common source of supply of natural gas'] only such proportion of the natural gas . . . as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply. . ."[14]

". . . ratable taking is . . . the proportion which the natural flow of gas from the wells of one producer bears to the amount of the natural flow from the wells of the other owners producing from the same common source of supply or common reservoir."[15]

". . . there should be a ratable production and a ratable taking of natural gas from the well owned by the Peerless Oil and Gas Company in proportion to those owned by the Republic Company, in order . . . to carry out the provisions of the statutes hereinabove mentioned."[16]

The cost element would assuredly be controlled by the going field price. In addition, by order promulgated 9 December 1946 in Cause Number 19514, the Commission set a minimum well-head price (in excess of going field price) for all gas produced from the Hugoton

13. Laws 1913, Ch. 198, p. 440, §2 (52 Okl. St. Ann. §232, p. 499).
14. Laws 1915, Ch. 197, §4 (52 Okl. St. Ann. §239, p. 503).
15. Paragraph 1, page 8, typewritten opinion of Oklahoma Supreme Court in case at bar.
16. Paragraph 4, page 6, mimeographed opinion of the Commission in the instant proceeding.

Field in Texas County, Oklahoma, [17] which price would govern the present litigants.

Therefore, it is a practical impossibility that the parties hereto could fail to "agree upon the terms and conditions of such a taking" were the instant judgment affirmed, or that, if a further application to the Commission were to require its determining the issue, anything more than mathematical computation would be necessitated.

In any event, regardless of difficulties which may *hereafter* arise if the litigants fail to agree upon ratable taking terms, there is, at this time, a final, complete, immediately effective and enforceable judgment; and its appealability cannot be affected by contingencies which can materialize only if, and after, the present final judgment is not complied with. A judgment may not be deprived of finality by controversies attendant only upon noncompliance with its definite command.

In passing, it should be noted that the judgment this Court reviewed on writ of error in *Pierce Oil Corporation v. Phoenix Refining Co.*,[18] possessed all the inconclusive characteristics upon which Appellees now rely in attributing infinality to the instant judgment, which assumes significance here in view of this Court's obligation

17. "That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma at a price, at the well-head, of less than 7¢ per thousand cubic feet of natural gas, measured at a pressure of 14.65 pounds absolute pressure per square inch." This order is now under appellate attack, but will control unless vacated by judicial order.

18. 259 U. S. 125, 66 L. ed. 855 (1922), affirming 79 Okla. 36, 190 Pac. 857 (1920). It is this decision upon which the final judgment herein of the Oklahoma Supreme Court is bottomed.

to disavow appellate jurisdiction of non-final judgments without motioned prompting from litigants:[19]

> "The order of the Corporation Commission only required the Pierce Oil Corporation and Clay Arthur Pierce to receive and transport the oil offered *so long as there was space available in their pipe line.*" (190 Pac. at 858; our italics)
>
> " . . . the Corporation Commission ordered the defendant Pierce Oil Corporation to carry oil offered to it by the Phoenix Refining Company from the producing wells of the Phoenix Refining Company . . . and to carry *such other oil as the Phoenix Refining Company may have to offer* so long as space in the line was available." (190 Pac. at 857; our italics)
>
> " . . . it was ordered to carry such oil as the Phoenix Company was then producing in the Cushing field, and such other oil as the Pierce Company might have available space or capacity to transport in its line, from the Cushing Field to Sand Springs. *Because the evidence was not deemed sufficient, no order was made as to rates.*" (259 U. S. at 126-127; our italics)

There is, we submit, another sound basis for according finality to the present judgment, even assuming, *arguendo,* the proceeding at bar may be denominated incomplete because of the Commission's jurisdiction to entertain further applications seeking administrative decreement of the terms of ratable taking.

We are not here concerned with a judgment *in vacuo* which merely determines general principles governing, but whose operative impact upon the unsuccessful liti-

19. For example, *Arnold v. United States*, 263 U. S. 427, 68 L. ed. 371 (1931).

gant will not be felt until termination of, further proceedings in the same cause (however ineluctably those general principles may ordain the litigation's *ultimate* result). The instant order is not comparable to a judgment decreeing the fact of a defendant's liability, but requiring no payment until subsequent ascertainment by a jury of the quantum of damages.[20]

Here, the judgment sought to be reviewed is *immediately* operative. It orders Appellant forthwith to take gas ratably from the Peerless well, and prohibits Appellant's producing gas from its own wells unless it does so. Nor is the mandate conditioned upon the litigants' first determining the terms of such taking, much less upon any further proceeding before the Commission in event voluntary accord is not achieved. *Instanter* Peerless lays a short line from its well to Republic's gathering system, Republic must surrender part of its market and dedicate its gathering facilities to accepting and carrying gas from the Peerless well. Appellant is commanded to accept gas from the Peerless well at once, irrespective of whether or not the parties have reached an accord upon terms of taking.

Note Appellant is required to designate the connection point "immediately" (Order, par. 1). It is ordered to make the necessary connection and to take gas ratably from the Peerless well, *not* following an agreement upon terms, but:

> ". . . as soon as applicant lays a line connecting said well with respondent's line, and to continue to do so until the further order of this Commission." (Order, par. 1)

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20. See, for example, *Bruce v. Tobin*, 245 U. S. 18, 62 L. ed. 123 (1917), relied on by Appellees at page 4 of their Motion to Dismiss—and representative of Appellees' authorities.

And observe the penultimate paragraph preceding the Commission's "Findings":

> If the price for this gas or the manner of taking cannot be agreed upon between the parties, this matter should be determined at a hearing at the request of either party, *but in the meantime a connection should be made on the Republic line.*" (Our italics)

Therefore, the instant judgment must be governed by the settled rule that an order depriving a litigant of specific property possesses appealable finality even though the terms of taking are deferred for subsequent determination. [21]

Applicability here of the foregoing authorities is revealed by the following elucidation of their *ratio decidendi* by this Court in *Radio Station WOW, Inc. v. Johnson, supra:*

> "In short, the rationale of those cases is that a judgment directing immediate delivery of physical property is reviewable and is to be deemed dissociated from a provision for an accounting even though that is decreed in the same order . . . " (326 U. S. at 126)
>
> ". . . if appellants had to wait, they would be subjected to irremediable injury, for execution had been awarded." (326 U. S. at 125, ft 'n. 2)

Here, as just noted, the judgment below compels the immediate surrender by Appellant of part of its gathering line capacity and of part of its market for its own

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21. *Radio Station WOW, Inc. v. Johnson, supra,* ft'n. 10, 326 U. S. 120; *Carondelet Canal and Navig. Co. v. Louisiana,* 233 U. S. 362, 58 L. ed. 1001 (1914); *Kashishke v. Baker,* 144 F. (2d) 384 (C. C. A. 10, 1944); *United States v. 243.22 Acres of Land,* 129 F. (2d) 678 (C. C. A. 2, 1942); *In re Casaudoumecq,* 46 F. Supp. 718 (S. D. Calif., 1942).

gas. Whatever the terms and conditions of ratable taking may prove to be, now, *instanter*, Appellant must accept and carry Peerless gas. Immediately the impact of the judgment strikes Appellant with a force unabated by postponing determination of the terms and conditions of taking.[22] Hence, it is submitted the "specific property" principle should be applied to the judgment in the case at bar.

It is submitted the Oklahoma Supreme Court's judgment, ordering Appellant forthwith to accept and carry in its gathering lines gas from the Peerless well, is appealably final notwithstanding the redundant recognition in the Commission's decision of its latent jurisdiction to entertain subsequent, separate applications in event, but only in event, the litigants fail to comply with the present order.*

II.

The Oklahoma Supreme Court Judgment Is Not Sustainable Upon a Non-Federal Ground.

In their motion to dismiss, Appellees contend the validity of the statutes and of the Commission's order was not passed upon by the Oklahoma Supreme Court; that

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22. And immediately Appellant transports Peerless gas for hire across state lines, it becomes exposed to the hazardous task of resisting Federal Power Commission assertions of jurisdiction under the Natural Gas Act: *cf. In re Billings Gas Company, et al.*, 2 F. P. C. 288, 35 P. U. R. (n. s.) 321 (1942); *Interstate Natural Gas Co. v. F. P. C.*, 156 F. (2d) 949 (C. C. A. 5, 1946), *affg.* 3 F. P. C. 416, 48 P. U. R. (n. s.) 267, *aff'd. by this Court* in unreported opinion delivered 16 June 1947; and *In re Fin-Ker Oil and Gas Production Co.*, Docket No. G-352, F. P. C. opinion No. 149, decided 20 May 1947.

* In event this Court should sustain the Motion to Dismiss, Appellant would appreciate an indication as to whether such order were premised upon infinality of the present judgment, inasmuch as dismissal on this ground would not preclude the possibility of subsequent appellate relief.

the judgment merely held Appellant was estopped to litigate this issue; and that a judgment grounded upon estoppel presents no appealable federal question.

Under division VIII of our Jurisdictional Statement we demonstrated the Oklahoma Supreme Court did in fact adjudicate validity of the statutes and order despite Appellant's timely and specific assertion that they were repugnant to the United States Constitution.

Thus, Appellant's contention, originally raised by answer before the Corporation Commission, assailed the statutes and the order sought by Peerless as:

> " . . . arbitrary, confiscatory, unreasonable, and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."[23]

Yet syllabus 3 of the Oklahoma Supreme Court's opinion expressly holds the Commission's order "was not arbitrary or beyond the jurisdiction of the Commission"; and the following language appears on the decision's final page:

> "Under the evidence and the authority granted by section 233, supra, the order was justified, and was not an arbitrary act of the Commission, nor beyond its power and jurisdiction."

Furthermore, in rejecting Appellant's protestation that the statutes could not constitutionally apply to it, or authorize the Commission's order, because Appellant was not a common carrier or common purchaser of gas, the Oklahoma Supreme Court held:

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23. Answer of Republic Natural Gas Company, R. 63 (Okla. Sup. Ct. Tr. 55-A).

"... the finding of the Commission that 52 O. S. 1941, sections 232 and 233, being sections 2 and 3 of Ch. 198 of S. L. 1913, are applicable to the situation here involved, is fully sustained by the undisputed evidence, and we are of opinion that *by said sections the Commission was empowered to require Republic to take ratably from the Peerless well.*" (Opinion, p. 7; our italics)

"... the above quoted provisions of the 1913 law go further and require one who is engaged in the business of producing, transporting and selling gas to take ratably from other producers from the same common reservoir who have no outlet for their production, *regardless of whether the party so transporting and selling his own gas be a common carrier or common purchaser of gas from that reservoir.*

"In Champlin Refining Co. v. United States .... U. S. ...., 91 L. Ed. 9, 67 Sup. Ct. Rep. 1, the Supreme Court of the United States held that under section 19 (a) of the Interstate Commerce Act, the Interstate Commerce Commission *could lawfully require* the Champlin Refining Company to furnish information as provided in said section, *although it* was not a common carrier or common purchaser, but *transported only its own products through its pipe line* from one state to another... *This case supports the contention of Peerless, upheld by the Corporation Commission ...*" (Opinion, p. 10; italics ours)

It is manifest that by the quoted language aforesaid, the Oklahoma Supreme Court, *without reference to or consideration of the doctrine of estoppel,* held, upon the authority of the Champlin Refining Co. decision, that the Oklahoma statutes and the Commission's orders were lawful and valid.

In any event, even were the judgment below predicated solely upon estoppel, it would nevertheless be reviewable by this Court.

It is, of course, unessential to appealability that a judgment deny constitutional rights in express terms.[24] Thus, in *Ancient Egyptian Arabic Order N. M. S. v. Michaux* (279 U. S. at 745) it is said:

> "And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision having no fair support."

And see *Norris v. Alabama* (294 U. S. at 589-590):

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, then that examination must be made . . . "

Furthermore, in any case the non-federal ground for decision must be substantial in order to render the judgment immune to review by this Court.[25] Even though constitutional objections be denied upon non-federal grounds, it is the province of this Court to inquire whether those grounds rest upon a fair or substantial basis; and if unsubstantial, this Court will afford relief

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24. *Norris v. Alabama*, 294 U. S. 587, 589-590, 79 L. ed. 1075 (1935); *Ancient Egyptian Arabic Order N. M. S. v. Michaux*, 279 U. S. 737, 745, 73 L. ed. 931 (1929); *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106 (1909); *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17, 48 L. ed. 598 (1904); *Columbia W. Power Co. v. Columbia Electric Street R. L. & P. Co.*, 172 U. S. 475, 487, 43 L. ed. 521 (1898).

25. *Broad R. P. Co. v. So. Carolina ex rel. Daniel*, 281 U. S. 537, 74 L. ed. 1023 (1930), *aff'd.* 282 U. S. 187, 75 L. ed. 287; *Ancient Egyptian Arabic Order N. M. S. v. Michaux, supra*, 279 U. S. 737; *Union Pacific R. Co. v. Public Service Comm.*, 248 U. S. 67, 63 L. ed. 131 (1918); *Terre Haute & I. R. Co. v. Indiana ex rel. Ketcham*, 194 U. S. 579, 48 L. ed. 1124 (1904).

to the agrieved litigant.[26] See, for example, this language by Mr. Justice Stone in *Broad R. P. Co. v. So. Carolina* ex rel. *Daniel, supra* (281 U. S. at 540):

> "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this court. Even though the constitutional protection invoked be denied on non-Federal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. [Citations.]"

Finally, if the non-federal ground is so interwoven with a federal ground as not to be independent, or is not of sufficient breadth to sustain the judgment without consideration of the federal ground, its inclusion in the judgment does not preclude review.[27] As Mr. Justice Hughes wrote for this Court in *Norris v. Alabama, supra,* 294 U. S. at 590:

> "Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former,

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26. *Great Northern R. Co. v. Washington,* 300 U. S. 154, 165-168, 81 L. ed. 573 (1937); *Lawrence v. State Tax Comm.,* 286 U. S. 276, 282, 76 L. ed. 1102 (1932); *Norris v. Alabama, supra,* 294 U. S. 587; *Abie State Bank v. Bryan,* 282 U. S. 765, 774, 75 L. ed. 690 (1931); *Broad R. P. Co. v. So. Carolina* ex rel. *Daniel, supra,* 282 U. S. 537, 540; *Ancient Egyptian Arabic Order N. M. S. v. Michaux, supra,* 279 U. S. 737; *Union Pacific R. Co. v. Public Service Comm., supra,* 248 U. S. 131.

27. *State Tax Commission v. Van Cott,* 306 U. S. 511, 83 L. ed. 950 (1939); *Norris v. Alabama, supra,* 294 U. S. 587, 589-590; *Abie State Bank v. Bryan, supra,* 282 U. S. 765, 773; *El Paso & N. E. R. Co. v. Gutierrez, supra,* 215 U. S. 87; *Grand Rapids & I. R. Co. v. Osborn, supra,* 193 U. S. 17; *Citizens' Bank v. Parker,* 192 U. S. 73, 48 L. ed. 346 (1904); *Columbia W. Power Co. v. Columbia Electric Street R. L. & P. Co., supra,* 172 U. S. 475, 487.

it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

The instant issue is inextricably bound up with the problems discussed in the ensuing section of this brief: whether the acceptance by Appellant, a foreign corporation, of the privilege of transacting business in Oklahoma is alone sufficient to estop it from asserting the invalidity of statutes enacted before Appellant entered the state; whether Oklahoma could constitutionally impose such waiver of the privilege of contesting the statutes' validity as the price for permission to operate in that state; and whether, in any event, the Commission's order should not be considered subsequent legislation to which the estoppel doctrine is inapplicable.

If, as we contend and will presently demonstrate, mere acceptance by a foreign corporation of the privilege of doing business in Oklahoma does not entail submission to unconstitutional state statutes, or if the Commission's order must be treated as subsequent legislation, or if Oklahoma's privilege to exclude Appellant did not encompass power to exact from Appellant a waiver of its rights to object to the enforcement of unconstitutional statutes, then insofar as the Oklahoma judgment purports to rest upon estoppel as justifying the application to Appellant of the statutes and Commission order, it necessarily upholds the validity of such statutes and order, and deprives Appellant of its constitutional rights.

Under these circumstances, Appellant's prerogative to solicit this Court's appellate review of the judgment may

not be impugned merely because the Oklahoma Supreme Court chose to rely upon what, applied to other facts,[28] might be considered a non-federal ground of decision.

As a matter of fact, the very case upon which the Supreme Court of Oklahoma and Appellees rely as supporting the conclusion that Appellant is estopped to assert unconstitutionality of the instant statutes and order — *Pierce Oil Corp v. Phoenix Refining Co., supra,* 259 U. S. 125 — is itself authority in refutation of their postulate that such an adjudication is non-federal and, therefore, nonreviewable. It will, of course, be noted that this Court *did* review the Oklahoma Supreme Court's judgment in the Pierce case upon writ of error.[29]

Furthermore, numerous decisions of this Court squarely support appealability of the judgment at bar. Thus, in *Grand Rapids & I. R. Co. v. Osborn, supra,* 193 U. S. 17, the state denied an asserted defense to enforcement of a rate order that it unconstitutionally abrogated contractual rights, on the ground of estoppel. Rejecting a

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28. We concede that in many instances predication of a judgment upon the ground that a litigant, by affirmative act, waived or became estopped to assert a particular contention, presents no federal question for review. But such authorities as Appellees rely upon at pages 5-6 of their Motion to Dismiss have no application here—as, for example, *Eustis v. Bolles,* 150 U. S. 361, 37 L. ed. 1111 (1893), where petitioner in error had accepted and retained $8,000 under a composition proceeding he later sought to impeach.

29. See, also, *Frost v. Railroad Comm.,* 271 U. S. 583, 70 L. ed. 1101 (1926); *Hanover Fire Ins. Co. v. Carr,* 272 U. S. 494, 71 L. ed. 372 (1926); *Power Mfg. Co. v. Saunders,* 274 U. S. 490, 71 L. ed. 1165 (1927); and *Wall v. Parrot Silver & Copper Co.,* 244 U. S. 407, 61 L. ed. 1229 (1917), in each of which this Court reviewed a judgment which allegedly enforced an unconstitutional statute, *despite the fact that each judgment was purportedly premised upon estoppel of the petitioner (or appellant) to contest the statute's validity.* Such authorities might be multiplied almost indefinitely.

contention that the petition in error should be dismissed since the state judgment rested upon the non-federal ground of estoppel, this Court said:

> "The determination of the alleged estoppel embodied in the ground of demurrer to the answer of the railroad company and which was sustained by the supreme court of Michigan, necessarily involved a consideration of this claim of a contract right, protected from impairment by the Constitution of the United States. In substance, if not in express terms, such question was passed upon by the court below. A Federal question which gives this court jurisdiction therefore arises on the record." (193 U. S. at 28)

Fully in point, too, is *Abie State Bank v. Bryan, supra,* 282 U. S. 765. There a bank sought to enjoin a special assessment levied pursuant to a Nebraska bank guaranty statute, asserting the levy deprived it of property without due process. The Nebraska Supreme Court held that because the bank had accepted certain benefits flowing from the attacked statute, it "should not be heard . . . to make complaint of a special assessment" (282 U. S. at 771). Upon appeal to this Court, the appellee, citing *inter alia, Pierce Oil Corp. v. Phoenix Refining Co., supra,* 259 U. S. 125, and *Pierce v. Somerset R. Co.,* 171 U. S. 641, 43 L. ed. 316 (1898), demanded dismissal on the ground that:

> " . . . the banks had waived their rights to question the constitutionality of the act by accepting benefits thereunder over a long period of years, and should be estopped from contesting the collection of the special assessment." (75 L. Ed. at 698)

> "... the supreme court [of Nebraska], exercising its proper authority, made an independent finding as to the waiver or estoppel which the appellees had pleaded in defense." (282 U. S. at 773).

In holding the Nebraska judgment reviewable despite its predication upon estoppel, this Court said:

> "But the federal ground being present, it is incumbent upon this court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. (Citations) As this court said in Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 61 L. ed. 644, 37 S. Ct. 318, supra: 'But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.'"

To the same effect is *Union Pacific R. Co. v. Public Service Comm., supra,* 248 U. S. 131, where a state supreme court denied, on the basis of estoppel, an attack by a foreign corporation upon the constitutionality of a state statute, and this court, in an opinion written by Mr. Justice Holmes, nevertheless reviewed and reversed the state court judgment, saying:

> "The supreme court of the state avoided this [federal] question by holding that the application to the Commission was voluntary, and hence that the railroad company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this court. But the later decisions show that such is not the law, and that, on the contrary, it is the duty of

this court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the Federal right has been waived."

Accord is *Citizens' Bank v. Parker, supra,* 192 U. S. 73, where this Court reviewed a judgment of the Louisiana Supreme Court denying a bank's resistance, upon constitutional grounds, to imposition of a license tax, despite the fact that the Louisiana court placed its decision on the bank's estoppel by reason of having accepted statutory benefits. And in *Brinkerhoff-Faris Trust & Savings Co., v. Hill,* 281 U. S. 673, 74 L. ed 1107 (1930), this Court reversed a Missouri Supreme Court judgment which had found the plaintiff "clearly guilty of laches" (281 U. S. at 676) and had, for that reason, rejected plaintiff's contention that a proposed tax levy was unconstitutional. Compare, also, *Ancient Egyptian Arabic Order N. M. S. v. Michaux, supra,* 279 U. S. 737.

Instances are legion where this Court has reviewed judgments denying asserted federal rights, notwithstanding the denials rested upon non-federal grounds alleged by petitioner or appellant to be erroneous.[30] As the foregoing authorities disclose, under such circumstances — which are those here present — the rejection of constitutional rights upon assertedly improper non-federal grounds itself raises a reviewable federal issue.

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30. *State Tax Commission v. Van Cott, supra,* 306 U. S. 511; *Great Northern R. Co. v. Washington, supra,* 300 U. S. 154, 165-168; *Norris v. Alabama, supra,* 294 U. S. 587, 589-590; *Lawrence v. State Tax Commission, supra,* 286 U. S. 276, 282; *Broad R. P. Co. v. So. Carolina ex rel. Daniel, supra,* 281 U. S. 537; *El Paso & N. E. R. Co. v. Gutierrez, supra,* 215 U. S. 87; *Terre Haute & I. R. Co. v. Indiana ex rel. Ketcham, supra,* 194 U. S. 579; *Columbia W. Power Co. v. Columbia Electric Street R. L. & P. Co., supra,* 172 U. S. 487. And see *Pierce Oil Corp. v. Phoenix Refining Co., supra,* 259 U. S. 125, and decisions cited in footnote 29, *supra.*

It is submitted there is no merit to the argument advanced by Appellees in their Motion to Dismiss.

III.

The Federal Question Posed By The Instant Appeal Is Substantial.

In the third and final section of their Motion to Dismiss, Appellees contend the federal issues raised by the instant appeal are unsubstantial, having been foreclosed by prior decisions of this Court. On the contrary, we respectfully submit that the arguments advanced by Appellees are themselves foreclosed by abundant precedent, and that the federal issue presented by this appeal is one which has never been determined adversely to Appellant's position by this Court or by any other court in the land.

(a) *Re waiver, by foreign corporation, of right to attack existing statutes by acceptance of privilege of doing business.*

Despite Appellees' assertion and the Oklahoma Supreme Court's ruling to the contrary, it is well settled that a foreign corporation, by accepting the privilege of transacting business in a state, does *not* thereby waive its right or become estopped to attack existing state statutes as unconstitutional.[31]

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31. *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629, 80 L. ed. 943 (1936); *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. ed. 927 (1928); *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 71 L. ed. 1165 (1927)—see Case Note, 41 Harv. L. Rev. 95; *Frost v. Railroad Comm.*, 271 U. S. 583, 70 L. ed. 1101 (1926); *Fidelity & D. Co. v. Tafoya*, 270 U. S. 426, 70 L. ed. 664 (1926); *Terral v. Burke Construction Co.*, 257 U. S. 529, 66 L. ed. 352 (1922); *Union Pacific R. Co. v. Public Service Comm., supra*, 248 U. S. 67; *Canadian Pac. Ry. Co. v. Sullivan*, 126 F. (2d) 433 (C. C. A. 1, 1942), *cert. den.* 316 U. S. 696, 86 L. ed. 1766; *Northwestern Nat. Ins. Co. of Milwaukee, Wis. v. Lee*, 49 F. (2d) 274 (D. Oregon, 3 judge court, 1931); *see Hanover Fire Ins. Co. v. Carr*, 272

Thus, it is said in *W. W. Cargill Co. v. Minnesota* ex rel. *Railroad & W. Comm., supra,* 180 U. S. at 468:

> "The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state railroad and warehouse commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission."

Mr. Justice Van Devanter wrote for this Court, in *Power Mfg. Co. v. Saunders, supra,* 274 U. S. at 497-498:

> "The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a state does not thereby become obligated to comply with or estopped from objecting to any provision in the state statutes which is in conflict with the Constitution of the United States."

To the same effect is *Quaker City Cab Co. v. Pennsylvania, supra,* 277 U. S. at 400-401:

U. S. 494, 71 L. ed. 372 (1926) and Case Note in 40 Harv. L. Rev. 777; *W. W. Cargill Co. v. Minnesota* ex rel. *Railroad & W. Comm.*, 180 U. S. 452, 45 L. ed. 619 (1900); *Springfield Fire & Marine Ins. Co. v. Holmes*, 32 F. Supp. 964 (D. Mont., 3 judge court, 1940), *rev. on other grounds* 311 U. S. 606, 85 L. ed. 384, *reh. den.* 311 U. S. 726, 85 L. ed. 473; *cf. Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 80-81, 81 L. ed. 510 (1937); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U. S. 544, 67 L. ed. 1112 (1923); and *Spaulding v. Douglas Aircraft Co.*, 154 F. (2d) 419 (C. C. A. 9, 1946).

> "It is established that a corporation, by seeking and obtaining permission to do business in a state does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States."

And see the summation of authorities in *Northwestern Nat. Ins Co. of Milwaukee, Wis. v. Lee, supra,* 49 F. (2d) at 279:

> ". . . the courts with practical unanimity, hold that a foreign corporation, once having been permitted to enter a state and engage in business, has a right to invoke the Fourteenth Amendment against unjust discriminations *whether they arise under legislation passed after its permit or before.* We think this is settled by the decision in *Liggett v. Baldridge,* 278 U. S. 105, 110, 49 S. Ct. 57, 73 L. ed. 204, as to legislation enacted subsequently to the admission of the foreign corporation to do business, and in the case of *Quaker City Cab Co. v. Commonwealth,* 277 U. S. 389, 48 S. Ct. 553, 72 L. ed. 927, as to legislation enacted before the foreign corporation was permitted to do business in the state." (Emphasis added)

The only two decisions to the contrary cited by Appellees are plainly distinguishable.

In *Pierce Oil Corp. v. Phoenix Refining Co., supra,* 259 U. S. 125, decided prior to crystallization of the principle announced in the cases immediately hereinbefore cited, the foreign corporation not only acquired the privilege of doing business in Oklahoma, but also filed with the Oklahoma Corporation Commission an *affirmative acceptance* of the provisions of the statute it later sought to attack (259 U. S. at 127). It applied for and

obtained an order temporarily exempting it from the provisions of the act, thereby acknowledging appreciation of the fact that its operations were within the statute's ambit. It exercised the privilege of eminent domain which the statute accorded (190 Pac. at 859). It was admittedly engaged in transporting oil of other persons for hire, and was a common carrier in fact (190 Pac. at 858; 259 U. S. at 126). The Commission's order, there, was "plainly within the scope of the statute in effect when it entered the state" (259 U. S. at 128). Finally, this Court placed considerable reliance upon:

> ". . . the large discretion which the state had to impose terms upon this foreign corporation as a condition of permitting it to engage in *wholly intrastate business* . . ." (259 U. S. at 128; our italics)

Since the Pierce corporation was transporting for hire oil owned by other persons, and not hauling merely oil from its own wells, its constitutional objections must be viewed in a different light than those of this Appellant.[32] And, in any case, the *affirmative* acceptance of the statute in the Pierce case deprives that decision of current pertinency:

> "Here was no such an *agreement to waive a claim of unconstitutionality* as in *Pierce Oil Co. v. Phoenix Refining Co.*, 259 U. S. 125, 127, 42 S. Ct. 440, 66 L. ed. 855 . . ."
>
> "The situation is entirely different from those in the estoppel cases relied upon by appellees. In each of these the party contending the unconstitutionality

32. *Cf. Valvoline Oil Company v. United States*, 308 U. S. 141, 146, 81 L. ed. 151 (1939).

of the statutes involved had acted *affirmatively* to procure a benefit from such statutes."[33]

As for the famous *Pipe Line Cases,* 234 U. S. 548, 58 L. ed. 1459 (1914), Appellees seemingly rely upon a single sentence in the opinion of Mr. Justice Holmes which was formulated during discussion of the rights of only five of the six appealing pipe line companies, those being the five which were in fact, although not in form, common carriers, and to whom, *without resort to estoppel,* it was held the statute had constitutional application:

> "The control of Congress over commerce among the states . . . may require those who are common carriers in substance to become so in form. *So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid.* So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we have already intimated, those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipe lines . . . There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view." (234 U. S. at 561; italics ours)

In discussing the rights of the Uncle Sam Oil Company, the only private carrier involved in the appeals, Mr. Justice Holmes does not so much as intimate that future *private* carriers may raise no objection to a sta-

33. *Spaulding v. Douglas Aircraft Co., supra.,* 154 F. (2d) at 422; italics added to the *first* paragraph quoted.

tute which seeks to impose upon them the obligations of a common carrier. The statute there under consideration merely compelled carriers common in substance to become so in form, and it was held constitutionally applicable even to common carriers whose operations antedated Congressional action. Since neither a subsequent pipe line, nor an unconstitutional statute, nor, in any event, a *private* carrier was before the Court for consideration, any language properly considered as expressing an opinion pertaining to the right of a *subsequent, private carrier* to assail an *unconstitutional* statute would be sheer *dictum*. Furthermore Congressional jurisdiction over corporations engaged in interstate commerce may not be likened to state rights touching admission of foreign corporations.

At all events, the authorities hereinbefore cited, decided subsequent to the Pierce and Pipe Line cases, clearly refute the argument of Appellees.

(b) *State may not impose upon foreign corporation, as a condition of admission, waiver of the right to assail unconstitutional statutes.*

Appellees cite one decision, *Washington* ex rel. *Bond & T., Inc. v. Superior Court*, 289 U. S. 361, 77 L. ed. 1256 (1933), for the proposition that a state may constitutionally impose upon a foreign corporation seeking admission thereto a requirement that the corporation accede to the provisions of existent statutes.

Again, however, Appellees fail to appreciate the determinative feature of the case at bar. True, a state may require entering corporations to accept *valid* existing statutes; and acceptance by the corporation of such a condition precludes its right thereafter to contest such enactments. But if the statutes are *unconstitutional*, then

a state may *not* exact from a foreign corporation a surrender of its right to resist them, and acceptance of the privilege of doing business does not estop the corporation from asserting its constitutional rights whether or not it accedes to the state's wrongful demands.

The very authority cited by Appellees itself recognizes this rule:

> "It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its part to all the *reasonable* conditions imposed. (Citations) *It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights,* as was attempted in the cases upon which the appellant relies. (Citations) And for this reason a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission. (Citation) But the statute here challenged has no such operation."[34]

If, as Appellant contends and this Court is asked to determine, the statutes and the order attacked in the case at bar are unconstitutional as applied to Appellant, then it is undeniable that Oklahoma was without authority to require Appellant to submit thereto, and that, even had Appellant expressly consented to such a condition upon its admission to do business in Oklahoma, nevertheless its right, now, to resist the statutes and order must remain inviolate.[35]

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34. *Washington* ex rel. *Bond & G. & T., Inc. v. Superior Court, supra,* 289 U. S. at 364-365; emphasis supplied.

35. *Phillips Petroleum Co. v. Jenkins, supra,* 297 U. S. 629; *Quaker City Cab Co. v. Pennsylvania, supra,* 277 U. S. 389; *Power Mfg. Co. v. Saunders, supra,* 274 U. S. 490, and Case Note in 41 Harv. L. Rev. 95; *Hanover Fire Ins. Co. v. Carr, supra,* 272 U. S. 494, and Case Note in 40 Harv. L. Rev. 777; *Frost v. Railroad Comm., supra,* 271 U. S. 583;

Mr. Chief Justice Taft stated the applicable principle thus, in *Terral v. Burke Construction Co., supra,* 257 U. S. at 532:

> "The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, *whether waived in advance or not.*" (our italics)

He repeated the rule as follows, speaking for this Court in *Hanover Fire Ins. Co. v. Carr, supra,* 272 U. S. at 507:[36]

> "The general principle . . . that foreign corporations cannot do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that a state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed."

Fidelity & D. Co. v. Tafoya, 270 U. S. 426, 70 L. ed. 664 (1926); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp., supra,* 262 U. S. 544; *Terral v. Burke Construction Co., supra,* 257 U. S. 529; *Union Pacific R. Co. v. Public Service Comm., supra,* 248 U. S. 67; *Canadian Pac. Ry. Co. v. Sullivan, supra,* 126 F. (2d) 433; *Northwestern Nat. Ins. Co. of Milwaukee, Wis. v. Lee, supra,* 49 F. (2d) 274; and *Springfield Fire & Marine Ins. Co. v. Holmes,* 32 F. Supp. 964 (3 judge court).

36. The proposition for which Appellees herein cite the Pierce case is expressly repudiated in the Hanover decision, 272 U. S. at page 516.

Accord is *Frost v. Railroad Comm., supra,* 271 U. S. at 596, 598:

> "For, conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution."
>
> "And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it."

See, too, *Quaker City Cab Co. v. Pennsylvania, supra,* 277 U. S. at 400-401:

> "It is established that a corporation, by seeking and obtaining permission to do business in a state does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the Federal Constitution."

(c) *The Commission's instant order should be considered as subsequent legislation to which the doctrine of estoppel is inapplicable.*

Appellees apparently concede the rule of estoppel upon which they rely does not, as it assuredly could not, apply with respect to a statute enacted after Appellant had acquired its privilege of doing business in Oklahoma. Plainly a corporation may resist subjection to subsequent unconstitutional enactments, including amendments to

prior legislation.[37] This right extends, also, to subsequent *applications* to a foreign corporation resulting from administrative or judicial interpretation of statutes in existence at the time the corporation acquired its right to enter the state. [38] In this connection, it appears settled law that the mere *application* of a statute to a particular person under a particular state of facts may present a federal constitutional issue, without regard to whether the statute might be upheld as applied to a different set of facts.[39]

Prior to the order now under attack, the subject statutes had never been interpreted or applied to facts remotely analogous to those here present, and undeniably that order inaugurated their attempted application to Appellant:

> "In the previous orders of the Commission . . . neither expressly nor by inference was any requirement made upon Republic to take gas from any wells except its own."[40]

Hence, the order in question is open to attack by Appellant under the rule of *Connecticut Gen. L. Ins. Co. v. Johnson, supra,* 303 U. S. 77.

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37. *Bacardi Corp. v. Domenech,* 311 U. S. 150, 85 L. ed. 98 (1940); *Connecticut Gen. L. Ins. Co. v. Johnson,* 303 U. S. 77, 82 L. ed. 673 (1938); *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 73 L. ed. 147 (1928); *Hanover Fire Ins. Co. v. Carr, supra,* 272 U. S. 494; *Springfield Fire & Marine Ins. Co. v. Holmes, supra,* 32 F. Supp. 964 (3 judge court).

38. *Connecticut Gen. L. Ins. Co. v. Johnson, supra,* 303 U. S. 77; *Hanover Fire Ins. Co. v. Carr, supra,* 272 U. S. 494; *cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra,* 281 U. S. 673.

39. *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 66 L. ed. 239 (1921); *Fidelity & D. Co. v. Tafoya, supra,* 270 U. S. 426; *Fiske v. Kansas,* 274 U. S. 380, 71 L. ed. 1108 (1927).

40. Paragraph 1, p. 3, typewritten opinion of Oklahoma Supreme Court in the case at bar.

In addition, the Commission's order herein is itself legislative in character, and a "statute" within the meaning of the Fourteenth Amendment to the Federal Constitution.[41] By the same token, that order constitutes a "subsequent statute" which Appellant is free to assail without regard to the estoppel doctrine.

In this connection, it should perhaps be pointed out that although the Commission's order was legislative in its inception, having been subjected to *judicial* review by the Oklahoma Supreme Court it became, thereby, transformed into a "suit" within the requirement of Sec. 237 (a) of the Judicial Code.[42]

Nor, we hasten to forfend, is there any question but that the Oklahoma Supreme Court's review herein was judicial. This Court's decision in *Southwestern Bell Teleph. Co. v. Oklahoma,* 303 U. S. 206, 82 L. ed. 751 (1938), stemmed from sections 20 through 23, and especially section 23, of Article IX of the Oklahoma Constitution.[43] The principle there applied has since been strictly confined to rate or traffic transportation orders governing

41. *Sultan Ry. & T. Co. v. Department of Labor and Ind.*, 277 U. S. 135, 72 L. ed. 820 (1928); *King Mfg. Co. v. Augusta*, 277 U. S. 100, 72 L. ed. 801 (1928); *Hamilton v. U. of California*, 293 U. S. 245, 79 L. ed. 343 (1934), *reh. den.* 293 U. S. 633, 79 L. ed. 717; *Live Oak Water Users' Assn. v. Railroad Comm.*, 269 U. S. 254, 70 L. ed. 305 (1926); *Northern Pac. R. Co. v. Department of Public Works*, 268 U. S. 39, 69 L. ed. 836 (1925); *Bluefield Water Works & Improv. Co. v. Public Service Comm.*, 262 U. S. 679, 67 L. ed. 1176 (1923); *Lake Erie & W. R. Co. v. State P. U. Comm.* ex rel. *Cameron*, 249 U. S. 422, 63 L. ed. 484 (1919).

42. *Old Colony Trust Co. v. Comm'r., supra*, 279 U. S. 716.

43. These constitutional provisions governed only appeals from orders concerning "rates, charges, or the classification of traffic of any transportation or transmission company" (Okla. Const. Ann., Art. IX, §23).

transportation companies.[44] Furthermore, following this Court's decision in the Bell Telephone Company case, the Oklahoma Legislature, pursuant to unique authority conferred upon it by the Oklahoma Constitution,[45] amended the aforesaid provisions of the state constitution in 1941 so that today, in all instances, the Oklahoma Supreme Court's review of any order of the Corporation Commission is *judicial*.[46]

We note Appellees' assertion (Motion to Dismiss, p. 7) that "on numerous occasions" both the Corporation Commission and the Oklahoma Supreme Court had made:

> ". . . identical applications of the statutes involved prior to the time that appellant qualified to do business in the State of Oklahoma."

But the record herein flatly contradicts that statement. At page 4 of its original order, the Commission itself confesses:

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44. See *Oklahoma Packing Co. v. Oklahoma G. & E. Co.*, 309 U. S. 2, 84 L. ed. 536 (1940); *Oklahoma Cotton Ginners' Ass'n. v. State*, 174 Okla. 243, 51 P. (2d) 327 (1935); *Cary v. Corporation Comm. of Okla.*, 17 F. Supp. 772 (W. D. Okla., 1936).

45. ". . . the Legislature may, by law, from time to time, alter, amend, revise, or repeal sections from eighteen to thirty-four, inclusive, of this article, or any of them, or any amendments thereof." (Okla. Const Ann. Art. IX, §35.)

46. L. 1941, §6, p. 547, 28 April 1941 (Okla. Const. Ann., Pocket Supp., Art. IX, §23) repealed former §23; and former §§20, 21, and 22 were amended, respectively, by L. 1941, §1, p. 544, §2, p. 545, and §3, p. 545 (Okla. Const. Ann., Pocket Supp., Art. IX, §§20, 21, and 22). The presently controlling statute (L. 1941, §1, p. 544, Okla. Const. Ann., Pocket Supp., Art. IX, §20) now provides:

"The Supreme Court's review of appealable orders of the Corporation Commission *shall be judicial only*, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts."

"This statute has never been directly interpreted by any court . . . "

And the Oklahoma Supreme Court makes an identical concession at page 8 of its typewritten opinion:

"So far as we have been able to find this court has never been called upon to construe and apply the provisions of these sections."

Nor are the "other decisions" construing "other statutes", to which the Commission, the Oklahoma Supreme Court, and Appellees refer, even distantly relevant.

Thus, *Oklahoma Natural Gas Co. v. Corporation Commission*, 90 Okla. 84, 216 Pac. 917 (1923), their chief reliance,[47] involved a *domestic* corporation which was a *public utility*, operating its own distribution system and also making city-gate sales of gas to other distribution companies for re-sale to ultimate consumers.[48] The case was:

". . . an appeal from an order of the Corporation Commission prescribing rates to be charged by the Oklahoma Natural Gas Company for gas furnished by it to various distributing companies and municipalities in the state." (216 Pac. at 917)

The sole issue determined is thus accurately condensed by the court's own opinion:

"The question presented by this appeal is whether the rates prescribed by the Corporation Commission are reasonable and just. The company contends that such rates, both city gate and distribution, are un-

47. Appellees' Motion to Dismiss, page 7, describes this case as involving "an order identical in principle" to the instant one.

48. "The Oklahoma Natural Gas Company is a public utility . . . " (216 Pac. at 918).

reasonable and unjust, and do not and will not render it a reasonable return upon the value of its property used and useful in rendering the service required of it." (216 Pac. at 919)

H. F. Wilcox Oil and Gas Company v. State,[49] *Oklahoma Natural Gas Corporation v. State,*[50] *C. J. Julian Oil & Royalties Co. v. Capshaw,*[51] and *Quinton Relief Oil & Gas Co., v. Corporation Commission,*[52] the other Oklahoma decisions declared to have invested Appellant with inceptive comprehension of the applicability to private gathering lines of the 1913 and 1915 statutes, albeit none involved or discussed either of such

49. 162 Okla. 89, 19 P. (2d) 347 (1933). Upon appeal from an order shutting in a well, counsel for the appellee-Commission confessed there was "no evidence in this record supporting the order appealed from" (19 P. (2d) at 349). Reversal therefore being inevitable, the Oklahoma Supreme Court severely criticized the Commission for having deprived the appellant "of its legal rights . . . not only in this instance, but in a prior instance wherein the attorneys for the appellees admitted in this court that the orders requiring the shutting in of the wells of this appellant were ineffective and void" (19 P. (2d) at 350). It then delivered a gratuitous lecture "for the guidance of the corporation commission in future hearings" (19 P. (2d) at 349), containing narry one word touching upon any issue entailed by the case at bar. It is this anomalous decision which is incorrectly cited atop page 3 of the instant, mimeographed Commission order as 119 P. (2d) 347.

50. 161 Okla. 104, 17 P. (2d) 488 (1932), upholding an order, issued pursuant to a 1921 statute, directing two *common purchasers* in fact and in law to take gas ratably. No objection was voiced that the order compelled a private gatherer of his own gas to purchase from others gas it did not want, and the opinion gives no intimation that the 1921 act, or any other enactment then extant, could apply to *private* gathering lines.

51. 145 Okla. 237, 292 Pac. 841 (1930), twenty-five pages of amorphous generalizations, which simply upheld a basic proration order, of the type prevailing in petroleum states, restricting each well to a production in the proportion that its potential bore to the total pool potential. No other problem was even considered.

52. 101 Okla. 164, 224 Pac. 156 (1924). This case merely upheld the state's authority to prohibit wasteful utilization of gas for carbon black manufacture, citing *Walls v. Midland Carbon Co.*, 245 U. S. 300, 65 L. ed. 276 (1920) as determinative of the entire appeal.

enactments, are no less disrelated than *Oklahoma Natural Gas Co. v. Corporation Commission, supra,* (216 Pac. 917), to any issue here pertinent.

On page 7 of their Motion to Dismiss, Appellees state:

> "The order of the Corporation Commission of the State of Oklahoma involved herein reflects that it had on numerous occasions made identical applications of the statutes involved prior to the time that appellant qualified to do business in the State of Oklahoma."

Per contra, it is patent from even a cursory reading of the instant Commission order that the case at bar was for it one of troublesome first impression. Nor have we been favored by either Commission or Appellees with the citation of so many as a single order of the Commission applying the 1913 or 1915 statutes to a private gatherer of its own gas from its own wells. Had any such order ever been promulgated, it is unthinkable that, as both the Commission and the Oklahoma Supreme Court concede, these statutes would never have become subject to judicial consideration.

Finally, we take notice of Appellees' declaration that:

> ". . . appellant knew of the interpretation placed upon the statutes involved by the Corporation Commission of the State of Oklahoma when it qualified to do business in the State of Oklahoma (R. 270)." (Motion to Dismiss, p. 7)

The same affirmation appears on page 10 of the mimeographed Commission order herein where the supporting evidence is directly referred to:

"Q. I will ask you if Commissioner Armstrong didn't ask you [Appellant] this further question [at a prior Commission hearing], and if you didn't make this further answer:

"'Q. It has always been the understanding between your company and the representatives of the Corporation Commission as you moved into Oklahoma, *that there was a ratable taking law* in this State?

"'A. Yes.'

"A. Yes, sir." (R. 340; Okla. Sup. Ct. Tr., 270)

It requires no argument to demonstrate that knowledge of the existence of the 1913-1915 "ratable taking laws" is nowise tantamount to realization that those statutes would one day be construed as applicable to private gatherers of their own gas from their own wells.

We submit the Commission's order herein should be treated as the legislative enactment of a "statute" long subsequent to Appellant's admission to Oklahoma, and that, therefore, Appellant may not be held to have "waived" its right to assert the unconstitutionality thereof.

We further submit that, under the authorities hereinbefore cited, even had Appellant knowingly and affirmatively agreed to abide enforcement against it of the 1913-1915 statutes in consideration of the privilege of doing Oklahoma business, those statutes, as applied to Appellant, being repugnant to the Constitution of the United States, such waiver would, by the same token, itself be void and unenforceable against Appellant.

(4) *The statutes and the Commission order are, as applied to Appellant, unconstitutional.*

We do not propose to argue, here, the merits of our appeal, save to the brief extent necessary to demonstrate substantiality of the federal issue it raises.

In the last paragraph of their Motion to Dismiss, Appellees cite *Ohio Oil Company v. Indiana,*[53] for the statement that a state Commission may shut in a gas well in order to prevent waste or protect correlative rights. This power, where waste exists, we concede. Even a natural person may be "shut in" by the state for violation of its lawful criminal codes.

But in the case at bar there was no "waste", the Commission's order being issued exclusively in behalf of the private "correlative rights of Peerless".[54] The cited decision constitutes no precedent whatever for the instant judgment.

Nor, for that matter, has any decision by any court in the land ever upheld the right of a state to compel a private gatherer of his own gas from his own wells in his own gathering lines, who neither purchases gas from nor transports gas for any other person, to purchase and carry gas from the well of another.

Champlin Refining Company, v. United States, 328 U. S. ..., 91 L. ed. (Adv. Sheet) 9 (18 Nov., 1946) not only did *not* so hold, but expressly left open the issue raised by the judgment at bar. That opinion, interpreting

53. 177 U. S. 190, 44 L. ed. 729 (1900). This case upheld a Commission order, pursuant to Indiana statutes, prohibiting the unrestrained flow of gas from a well into the open air, and commanding the well owner to confine its gas "in tanks, pipes, or other proper receptacles" (177 U. S. at 197)—an unarguably proper recognition of the state's power to prevent sheer waste of its valuable natural resources.

54. First paragraph, last page of the typewritten opinion of the Oklahoma Supreme Court in the case at bar.

Section 19(a) of the Interstate Commerce Act and involving the interstate commerce powers of Congress, merely held that a private pipe line company might be compelled by the Interstate Commerce Commission to furnish *information;* in it, this Court was careful to point out that it did not intend thereby to uphold the Commission's power to impose common carrier-like obligations upon the appellant:

> "Appellant further contends that, as so construed, the Act exceeds the commerce power of Congress and violates the Fifth Amendment because it is argued that this interpretation converts a private pipe line into a public utility and requires a private carrier to become a common carrier. *But our conclusion rests on no such basis and affords no such implication.* The power of Congress to regulate interstate commerce is not dependent on the technical common carrier status but is quite as extensive over a private carrier. [It does not follow that a state is imbued with comparable power over foreign corporations desiring to transact business within its borders.] This power has yet been invoked *only to the extent of requiring Champlin to furnish certain information* as to facilities being used in interstate marketing of its product. The commerce power is adequate to support *this requirement* whether appellant be considered a private carrier or a common carrier.
>
> "The contention that the statute as so construed violates the due process clause by imposing upon a private carrier the obligations of a conventional common carrier for hire *is too premature and hypothetical to warrant consideration on this record. The appellant in its entire period of operation has never been asked to carry the products of another and may never be. So far, the Commission has made no order which changes the appellant's obligations to any*

other company or person: If it does, it will be timely to consider the concrete requirements and their specific effects on appellant. At present, appellant is asked only to provide information about a subject within the power possessed by Congress and delegated to the Commission, and that cannot be considered a taking of property even if it arouses appellant's premonitions.]' (91 L. ed., Adv. Sheet, p. 12; our emphasis)

Undeniably, therefore, the Champlin decision lends no support to the instant judgment.

Subject to precisely this same distinction is *Valvoline Oil Company v. United States, supra,* 308 U. S. 141, where the same type of "informational" order was reviewed. In addition, the appellant there was not solely a transporter of its own oil, its factual situation being similar to that of the 5 unsuccessful appellants in *The Pipe Line Cases, supra,* 234 U. S. 548, rather than to that of the *Uncle Sam Oil Company:*

"... that company's [Uncle Sam Oil Company's] pipe line was used for the 'sole purpose of conducting oil from its own wells to its own refinery.' This was held not to be transportion under the Act. Here, however, it is the purchase from many sources and subsequent carriage that determines the applicability of the statute to Valvoline." (308 U. S. at 146)

And as heretofore pointed out, *The Pipe Line Cases* themselves did not sustain the statute as to private carriers. They merely held Congress, in the exercise of its interstate commerce powers, could "require those who are common carriers in substance to become so in form" (234 U. S. at 561); the only *private* carrier there involved, The Uncle Sam Oil Company, was exempted by this Court from the statute's application.

The immediately foregoing constitute all of the decisions cited and relied upon by the instant Appellees, the Oklahoma Corporation Commission, and the Supreme Court of Oklahoma as justifying the present judgment. Yet not one is a relevant precedent here.

Neither has our research disclosed any decision by any court which even tends to support the instant judgment. On the other hand, *The Uncle Sam Oil Company* decision, *Texoma Natural Gas Co., v. Railroad Commission*, 59 F. (2d) 750 (W. D. Texas, 3 judge court, 1932), and *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. ed. 510 (1937), sustain our contention that the Oklahoma statutes and Commission order may not constitutionally be applied to Appellant.

The facts of the Texoma case are indistinguishably parallel to those here present, and the court there held an order like the one here under attack, premised, like the instant order, upon a theory of protecting private "correlative rights", was invalid:

> "The carrier's private status is changed to that of public by the declaration of the act alone. The Legislature is without power to do this. It is taking private property for public use without just compensation, inconsistent with the due process of law clauses of the Fourteenth Amendment to the Constitution." (59 F. (2d) at 753)

The Texoma decision merited this Court's approval in the Thompson case, the following excerpts from the latter opinion being illustrative of its pertinency here:

> ". . . the plaintiffs assert that . . . [the order's effect] . . . is not to prevent waste of gas in the common reservoir nor to prorate the opportunities for *production as distinguished from marketing;* that

the limitation of the production of wells is merely a device to compel the individual plaintiffs, and other pipe line owners, to purchase gas for which they have no need; that the real purpose and effect of the order are to prorate *not production, but distant markets and the facilities* for servicing them; and that, thus, the order takes their property without warrant in law." (300 U. S. at 67-68; our italics)

"The defendants contend, apparently, that House Bill 266 should be construed as authorizing the Commission to reduce the production of the plaintiffs and of other pipe line owners, even if the sole purpose for doing so is to furnish a market for the sweet gas of those wells now without pipe line connections [300 U. S. at 73] . . . . we are clearly of opinion that if the Act were construed as the defendants contend it should be, and as the Commission has applied it, it would violate the Federal Constitution . . . ." (300 U. S. at 75)

"Every well owner in the field is free to produce the gas, provided he does not do so wastefully. He is legally and, so far as appears, physically free to provide himself with a market and with transportation and marketing facilities. There is no basis for a claim that his right, or opportunity, will be interfered with by a disproportionate taking by any one of those who may legally produce." (300 U. S. at 77)

"The use of the pipe line owner's wells and reserves is curtailed solely for the benefit of other private well owners. The pipe line owner, a private person, is, in effect, ordered to pay money to another private well owner for the purchase of oil which there is no wish to buy . . . Plaintiff's pipe lines are private property. So far as appears, they are constructed on private lands. There is no suggestion that any of them is a common carrier of gas. The purpose of the owners in constructing the pipe lines was for the transport of gas only from their own

leases, and such has been their consistent policy . . . the pipe lines are not used in connection with the operation of any public utility in Texas.

"The purpose of this order is the same as that which the Legislature sought to achieve by the 'Common Purchaser Act', of August 12, 1931, held unconstitutional in *Texoma Natural Gas Co. v. Railroad Commission* (D. C.) 59 F. (2d) 750.

"Our law reports present no more glaring instance of the taking of one man's property and giving it to another." (300 U. S. at 77-80)

Manifestly the instant appeal raises a substantial federal question in the sense that the Oklahoma Supreme Court's judgment is *at least* arguably incorrect. In fact, not only is that judgment unsupported by judicial precedent, but it is directly impeached by the adjudications immediately hereinbefore discussed.

Furthermore, if permitted to stand its effects will be so obviously innovatory and portentously far reaching that review by this Court is imperative. It would appear to necessitate no discussion by us to establish the nationwide importance of a judgment decreeing that a private person must devote his private property to the services of his neighbor merely because that neighbor does not deem it economically feasable to make the requisite capital expenditure to acquire similar facilities for himself.

We respectfully submit both that the instant judgment is reviewable by this Court, and also that the federal question involved is of such incalcuably widespread and momentous significance that to denominate it "substantial" is consummate understatement.

The motion to dismiss should be denied.

Respectfully submitted,

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